

BELCO PETROLEUM CORP.

IBLA 85-681

Decided March 11, 1987

Appeal from a decision of the Wyoming State Office, Bureau of Land Management, denying a proposal for the exchange of Federal coal lease W-0322794 for other Federal coal lands.

Vacated and remanded.

1. Act of October 30, 1978 -- Coal Leases and Permits: Leases --
Exchanges of Land: Generally

Under the regulations at 43 CFR Subpart 3435 which were promulgated to implement, inter alia, the Act of Oct. 30, 1978, P.L. 95-554, 92 Stat. 2073, a coal lease exchange proposal shall be evaluated in terms of whether the exchange is in the public interest. The Act of Oct. 30, 1978, authorizes the Secretary to approve lease exchanges for all or portions of specified existing leases transected by parts of Interstate Highway 90 in Wyoming, in order to avoid conflicts and problems associated with surface mining near or under highways. A decision by the Bureau of Land Management rejecting an exchange proposal submitted under that Act will be vacated when it fails to undertake the public interest determination required by both the regulations at 43 CFR 3435.2(c) and by the terms of an agreement entered into between the coal lessee and the Government.

APPEARANCES: Joyce A. Doyle, Esq., New York, New York, and Thomas E. Ebzery, Esq., Billings, Montana, and Brent R. Kunz, Esq., Cheyenne, Wyoming, for Belco Petroleum Corporation; Lyle K. Rising, Esq., Office of the Regional Solicitor, Rocky Mountain Region, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Belco Petroleum Corporation (Belco) has appealed the May 3, 1985, decision of the Wyoming State Office, Bureau of Land Management (BLM), denying Belco's proposal to exchange coal lease W-0322794 for other Federal coal lands, pursuant to the Act of October 30, 1978, P.L. 95-554, 92 Stat. 2073 (the Act or P.L. 95-554).

In January 1966, Max L. Krueger, Belco's predecessor in interest, applied for a coal prospecting permit. BLM issued the permit effective

October 1, 1967, and Krueger subsequently received preference right coal lease W-0322794 on January 1, 1970. BLM approved assignment of that lease to Belco, effective July 1, 1980. The lease embraces 4,551.46 acres in Johnson County, Wyoming, and includes lands crossed by a portion of Interstate Highway 90 (I-90) which was begun in 1960 and completed in 1965. ^{1/}

On October 30, 1978, Congress passed P.L. 95-554, which authorized the Secretary of the Interior to exchange certain Federal coal leases or rights thereto. The legislative history of the Act is clear that this statute was adopted to allow coal lease exchanges in "two urgent cases." 124 Cong. Rec. 33283 (1978). The first case involved rights to certain coal leases in Utah; the second case related to coal leases which underlie portions of certain highways in Wyoming:

The second exchange would permit several Wyoming leaseholders to surrender all or portions of existing leases which underlie Interstate Highway 90 and two State highways. This exchange will eliminate a dispute, possible litigation, and costly rerouting of the existing roads which might occur if the existing leases were developed.

Id.

The relevant portions of the Act apply to several leases, including W-0322794, in specific terms:

(b) Notwithstanding any provision of law to the contrary and notwithstanding the provisions of section 2(a)(1) of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 201(a)(1)), the Secretary of the Interior is authorized to issue leases for coal on other Federal lands in the State of Wyoming to the owner or owners of Federal coal leases serial numbers W0313666, W0111833, W073289, W0312311, and W0313668, B025369, W0256663, W5035, W0322794 covering lands in the State of Wyoming upon the surrender and relinquishment of such leases or portions thereof.

(c) The leases to be issued by the Secretary pursuant to the authority granted by subsections (a) [^{2/}] and (b) of this Act and the leases or portions thereof or rights to leases to be

^{1/} The lease contained no condition or stipulation relating to I-90. However, section 522(e)(4) of the Surface Mining Control and Reclamation Act (SMCRA), 30 U.S.C. § 1272(e)(4) (1982), enacted on Aug. 3, 1977, prohibits surface mining on lands "within one hundred feet of the outside right-of-way line of any public road * * *." This prohibition, however, was subject to "valid existing rights." See S. Rep. 95-128, 95th Cong., 1st Sess. (1977), at 54-55.

^{2/} Subsection 1(a) of P.L. 95-554 authorizes the Secretary to issue leases for coal on other Federal lands in the State of Utah to specifically named preference right lease applicants upon surrender of their applications.

exchanged therefor shall be of equal value. If such leases or portions thereof or rights to leases are not of equal value, the Secretary is authorized to receive, or pay out of funds available for that purpose, cash in an amount up to 25 per centum of the value of the coal lease or leases to be issued by the Secretary in order to equalize the value of the lease rights to be exchanged.

(d) Any exchange lease issued by the Secretary under the authority of this Act shall contain the same terms and conditions as those leases surrendered, or in case of a surrendered lease right, the same terms and conditions as those to which the lease applicant would be entitled.

(e) This subsection does not require or obligate the Secretary to take any action or to make any commitment to a lessee or lease applicant with respect to issuance, administration, or development of any lease.

Subsequently, BLM, the United States Geological Survey (Survey) and Belco entered into an agreement (Agreement), executed in final form on March 2, 1982, which provided for "an evaluation and full examination of the need for and possible merits and benefits which might flow from issuance of a coal lease" in exchange for relinquishment of W-0322794 pursuant to P.L. 95-554. The Agreement specifically provided in section (a) that the parties would "proceed in a diligent manner and in good faith to make such an exchange by December 1, 1983, subject to a finding by the BLM that the exchange is the public interest." (Emphasis added.) ^{3/}

In its May 3, 1985, decision BLM denied the proposal for the following reasons:

^{3/} Section 2(b) of the Agreement provided that the lands to be studied for exchange were the "Hay Creek Tract" lands in Campbell County, Wyoming. If those lands were deemed unacceptable for exchange purposes after review of environmental considerations and coal resource data, section 16 provided that BLM and Belco could pursue a lease exchange for other tracts in the general location of the Hay Creek Tract, including the "Calf Creek" and the "Rockpile" tracts. Section 4 of the Agreement required Belco to conduct for Survey "all additional drilling, coring and logging necessary to establish the quantity and quality of the coal reserves in the 'Hay Creek Tract' lands by October 15, 1981." Further, Belco was required under section 6(a) to submit to Survey geologic data, including drill logs and proximate and ultimate analyses of the coal by Nov. 15, 1981. Sections 9 and 11 required Survey to make preliminary and final economic evaluations of both the offered and "Hay Creek Tract" lands by July 1, 1982 and June 1, 1983, respectively. Of final note was BLM's obligation to prepare and publish an environmental assessment or environmental impact statement which addressed the proposed exchange no later than Oct. 1, 1983.

On October 30, 1978, Public Law 95-554 provided the Secretary of the Interior with the discretion to exchange nine coal leases that were associated with Interstate Highway 90 (I-90). Belco's coal lease number W-0322794 was one of the nine cited leases. In March 1982, Belco signed an agreement with the Department of the Interior which agreed to an evaluation of the needs and merits for the exchange. Nothing in this law or agreement obligated the Department or Bureau to authorize such an exchange.

Upon close examination of the subject lease, the Bureau found that the construction of I-90 did not encumber Belco's holding. Rather, Belco had acquired the lease via assignment in 1970, approximately 10 years after the I-90 construction commenced. Furthermore, the examination raises serious doubt concerning the value of the offered lease and whether the entire lease is encumbered by I-90. In any event, the U.S. Government should not compensate a coal lessee for an alleged encumbrance which was known well in advance of lease issuance and acquisition.

In view of the chronology of events, a detailed version of which is enclosed, I-90 construction is determined not to represent a taking from Belco. The proposed exchange is therefore denied.

Belco challenges BLM's denial on a number of grounds. First, it argues that BLM's decision is "arbitrary, capricious, and an abuse of whatever discretion was granted to the Secretary by P.L. 95-554, and represents a failure to consider the factors relevant to fulfilling the intent of Congress" (Statement of Reasons (SOR) at 3). BLM's decision, according to Belco, ignores the purposes of the statute, *i.e.*, "to avoid coal development in environmentally sensitive areas, including the area near Lake DeSmet in Johnson County, Wyoming, where the Lease is located," and in favor of those areas "already geared up to handle massive extraction" (SOR at 4, quoting 124 Cong. Rec. 33283 (1978)).

Second, Belco faults BLM for its failure to make a "good faith determination of whether the exchange was in the public interest," and for failing "to proceed in a diligent manner and in good faith to make the exchange," as required by the Agreement (SOR at 5). Belco asserts that it conducted a costly drilling program of the magnitude and in the location selected by BLM, as called for by the Agreement. According to Belco, this information was never considered by BLM in reaching its decision to deny the exchange proposal.

Third, Belco argues, BLM's decision rests primarily upon the fact that Belco's lease was issued subsequent to the construction of I-90, so that the highway did not encumber Belco's lease. Belco contends that the encumbrance was created by the passage of SMCRA, which prohibits surface coal mining within 100 feet of a highway, and that Congress sought to remedy the "taking" effected by that prohibition by promulgating P.L. 95-554. In this connection, Belco questions the propriety of BLM's approval of an exchange for another

lease (W-5035) listed in P.L. 554, held by Exxon Coal Resources USA, Inc. (Exxon). W-0535 was issued subject to a right-of-way for I-90.

Fourth, Belco questions BLM's apparent assumption that any encumbrance must affect Belco's entire lease as a prerequisite for a lease exchange under the Act. Again, Belco points to BLM's approval of Exxon's exchange proposal as demonstrating the arbitrary nature of BLM's disposition of the W-0322794 exchange proposal. Belco alleges that construction of I-90 only transected 2 of 7-1/2 sections included in Exxon's lease, but Exxon was permitted to exchange 4-1/2 sections and retain 3 sections.

Fifth, Belco asserts that BLM waived its rights to deny its exchange, since "[a]t no time during the seven years since passage of Pub. L. 95-554 was the issue of the pre-existence of I-90 raised" (SOR at 14). Moreover, Belco claims it spent significant "time and money * * * selecting exchange coal properties and performing the BLM mandated drilling programs and the economic analysis of the Lease" (SOR at 15).

[1] The arguments which Belco offers to support its challenge to BLM's denial of its exchange proposal share a common basis, i.e., that BLM has exercised the discretion conferred by P.L. 95-554 in an arbitrary and capricious manner. On the other hand, counsel for BLM argues that the BLM decision "must be upheld if it has any rational basis" (BLM's Reply at 5). Such a limitation on the scope of Board review was expressly rejected by the Board in United States Fish and Wildlife Service, 72 IBLA 218 (1983), in which we stated at page 220:

The Secretary, or an appeals board with authority to act as fully and finally as might the Secretary, is not so limited in the scope of appellate review and decisionmaking as to be required to affirm decisions by subordinate officers and employees merely because they are supported by "substantial evidence" or are perceived not to be arbitrary and/or capricious, particularly where a preponderance of the evidence leads to a different result. The Secretary, as chief executive officer of the Department with full supervisory powers, has plenary authority to review de novo all official actions and to decide appeals from such actions on the basis of a preponderance of the evidence in cases involving substantive rights, or on the basis of policy or public interest in cases involving the exercise of discretion. [Emphasis in original.]

Clearly, where the Board finds the decision appealed from is arbitrary and capricious, it will not be affirmed. Katmailand, Inc., 77 IBLA 347, 359 (1983). A decision is arbitrary and capricious when it is made on a basis other than the standard articulated in the authorizing statute or the implementing regulation. E.g., Eudey v. Central Intelligence Agency, 478 F. Supp. 1175, 1177 (D.D.C. 1979). The grant of discretion in P.L. 95-554 is stated in broad terms, but it is not without standards by which to measure the Secretary's exercise of discretion. Whether BLM's discretion was exercised properly in this particular case must be analyzed in light of regulations

promulgated by the Department to implement several Federal statutes, including P.L. 95-554. The regulations embodied in 43 CFR Subpart 3435 have as their stated objective:

to provide methods for exchange of coal resources when it would be in the public interest to shift the impact of mineral operations from leased lands or portions of leased lands to currently unleased lands to preserve public resource or social values, and to carry out Congressional directives authorizing coal lease exchanges. [Emphasis added.]

43 CFR 3435.0-1.

Further, 43 CFR 3435.1(a) addresses exchanges for leases specifically mentioned in P.L. 95-554:

Where the Secretary determines that coal exploration, development and mining operations would not be in the public interest on an existing lease or preference right lease application or portions thereof, or where the Congress has authorized lease exchange for a class or list of leases, an existing lease or preference right lease application may be relinquished in exchange for:

(a) Leases where the Congress has specifically authorized the issuance of a new coal lease; * * *. [Emphasis added.]

The regulations at 43 CFR 3435.2(c) provide the following guidance where Congress has authorized an exchange: "The Secretary shall evaluate each qualified exchange request and determine whether an exchange is in the public interest." [Emphasis added.]

The words "public interest" "take meaning from the purposes of the regulatory legislation." NAACP v. Federal Power Comm'n, 425 U.S. 662, 669 (1976). ^{4/} The legislative history of the Act indicates that the I-90 lease exchanges would "eliminate a dispute, possible litigation, and costly rerouting of the existing roads which might occur if the existing leases were developed" 124 Cong. Rec. 33283 (1978). See also SOR, Exh. I. ^{5/} Therefore, in one sense Congress in enacting P.L. 95-554 was determining that the public

^{4/} At page 669 the Court gives the following example of how the term "public interest" is circumscribed by the purposes of a statute:

"[I]n the case of the Interstate Commerce Commission, which is responsible for enforcing an Act 'designed * * * better to assure adequacy in transportation service,' 'the term public interest * * * is not a concept without ascertainable criteria, but has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities * * *.'" Quoting New York Central Securities Corp. v. United States, 287 U.S. 12, 24-25 (1932).

^{5/} P.L. 95-554 represented a compromise resulting from Senate and House disagreement over the breadth of generic exchange authority. The Senate favored

interest would be served by avoiding a "dispute and possible litigation" by allowing exchange of certain leases. However, the legislation did not mandate that any particular exchange be completed and, thus, reserved to the Secretary the discretion whether to proceed. The only standard established by the Secretary to evaluate an exchange proposal was whether it was in the public interest, the standard incorporated in both the Agreement and the regulations at 43 CFR 3435.2(c).

Accordingly, the standard by which BLM should have evaluated Belco's exchange request was whether granting Belco's request was in the public interest. The phrase "public interest" is given meaning by 43 CFR 3435.0-1, which links it to the question whether the exchange will preserve public resource or social values.

BLM's May 3, 1985, decision denying Belco's exchange proposal does not address that standard; however, it sets forth three other reasons for denying Belco's exchange proposal. Receiving most emphasis in BLM's decision is the fact that Belco acquired the lease in 1970, "approximately 10 years after the I-90 construction commenced." For this reason, BLM concluded that "I-90 construction is determined not to represent a taking from Belco." Two additional reasons mentioned in BLM's decision are that there are questions concerning the value of the offered lease, and that the entire lease is not encumbered by I-90.

The threshold issue of eligibility for exchange was decided by Congress in enacting P.L. 95-554. Clearly, that statute was enacted to avoid difficulties which could arise in allowing a coal lessee to mine a lease intersected by one or more public highways. Section 522(e) of SMCRA, 30 U.S.C. § 1272(c) (1982), prohibits mining within 100 feet of a public highway, but the legislative history of section 522 of SMCRA states that "all of these bans listed in subsection (e) are subject to valid existing rights." S. Rep. 95-128, 95th Cong., 1st Sess. (1977), at 54-55. In P.L. 95-554 Congress sought to shortcut future problems which could arise relating to development of certain enumerated leases.

Belco challenges BLM's conclusion that "the U.S. Government should not compensate a coal lessee for an alleged encumbrance which was known well in advance of lease issuance and acquisition." Belco's position is that Congress created an encumbrance on Belco's lease by passage of section 522 of SMCRA, and that Congress acknowledged the conflict between I-90 and development of the lease in the legislative history of P.L. 95-554. We agree with Belco

fn 5 (continued)

a limitation on exchange to those instances in which the adverse impacts sought to be avoided by the exchange could not be prevented or adequately mitigated under any provisions of SMCRA. The House opposed this restriction. Congress, therefore, deferred consideration of the generic exchange issue in favor of P.L. 95-554 which authorized exchange in only two specific cases. However, Senator Jackson, Chairman of the Senate Committee on Energy and Natural Resources, believed P.L. 95-554 was not inconsistent with the Senate's restriction on the use of the exchange authority (SOR, Exh. I at 6-7).

that the chronology involved is irrelevant in determining whether an exchange is in the public interest. The basic fact is that Congress, at the urging of the Department of the Interior, passed this specific legislation in order to avoid the problems associated with having a lessee develop coal property in an interstate highway area. See SOR, Exh. 6-7; 124 Cong. Rec. 33284 (1978).

Moreover, this stated reason for rejecting Belco's proposal is apparently inconsistent with BLM's approval of another P.L. 95-554 exchange proposal. BLM approved an exchange proposal by Exxon whose lease W-5035 was issued subject to an approximate 400-foot right-of-way for Interstate Highway I-90. Belco argues that such an approach amounts to arbitrary and capricious action. Belco takes the position that since its lease was not issued subject to a right-of-way for I-90, it enjoys the legal right to mine the subject areas -- indeed, to move the highway and mine beneath it, yet BLM denied its exchange. 6/ Exxon, on the other hand, proposed exchange of a lease expressly subject to a right-of-way, and BLM approved it.

Belco's argument is buttressed by a memorandum dated January 16, 1981, from the Acting Associate Solicitor, Energy and Resources, to the Director, BLM, addressing the subject of the prohibitions against mining embodied in section 522 of SMCRA as they relate to leases subject to exchange under P.L. 95-554. The memorandum makes special note of the Exxon lease, stating that the presence of the right-of-way removes "any right to mine the coal or conduct other activities on that portion of the lease" (SOR, Exh. I at 10-11). Further, it concludes that since Exxon took no value in the coal subject to the right-of-way, "no value should be attributed to that coal for the purposes of the lease exchange." Id. at 11.

BLM justifies its action on the basis that while Belco and Exxon occupy similar positions in the strict Fifth Amendment sense, "in a policy sense the two companies are poles apart" (BLM Reply Brief at 7). BLM discounts the memorandum, stating while it was correct in the legal sense "when speaking of a Fifth Amendment taking, it was essentially irrelevant as a policy matter in determining whether the Department should make the proposed exchange" (BLM Reply Brief at 5). (Emphasis in original.) BLM asserts that it decided to consummate the exchange with Exxon for three policy reasons:

First, Exxon paid for all the coal by competitive bidding. Second, the highway was constructed 8 years after the lease issued. True, it is that BLM had reserved an indefinite right-of-way to be built at an indefinite time in the future. But it is common knowledge that many a government project which has been

6/ We do not here decide whether or not Belco is correct in its assertion that it was possessed of the legal right to move the highway and mine beneath it. Whatever relevance this issue may have to the question of valuation of the lands which Belco seeks to exchange, we do not view it as dispositive of whether or not the public interest would best be served by completing an exchange.

authorized is never built because Congress never appropriates the funds. It could well have happened that Congress might never have appropriated the funds for construction of the highway. In that case, Exxon would indeed have had the right to mine for the life of the lease. That right was terminated by construction of the highway.

BLM's third policy reason for consummating the Exxon exchange was the propinquity of the entire lease to the City of Gillette, Wyoming. * * * The City argued and BLM ultimately agreed that such a mine was inappropriate in such close proximity to a city, as the impacts of pollution and traffic, among other things, would be too great. [Emphasis in original.]

(BLM Reply Brief at 6.)

BLM's first reason is simply irrelevant to a determination of whether to grant a lease exchange under P.L. 95-554 and 43 CFR Subpart 3435. Section 1(b) of P.L. 95-554 makes no distinction between leases obtained by competitive bidding and those obtained noncompetitively through the preference right lease application (PRLA) process. In fact, section 1(a) authorizes the Secretary to issue exchange leases for a series of PLRA's. Thus, the Department's regulations not only authorize BLM to approve exchanges for existing leases such as Belco's lease, but also a PLRA may be relinquished in exchange for a lease.

Belco questions BLM's emphasis on chronology of lease issuance and highway construction in the two cases. According to Belco, even though I-90 was constructed 8 years after Exxon obtained its lease, Exxon knew that the highway would be built. Belco offers several documents, in addition to Exxon's lease itself, which contains a right-of-way for I-90, to support its position that the distinction BLM seeks to make between Exxon and Belco is either non-existent or meaningless (Belco's Reply Brief at 10-13). Among those documents which display Exxon's advance knowledge that I-90 would be constructed is an April 29, 1980, letter from the Deputy Director of BLM to the Mayor of the City of Gillette, which says:

During the review of Exxon's lease (W-5035) we found that at the time the lease was issued it was common knowledge that I-90 would cross the potential lease tract, thus the lease included a stipulation which excluded mining within a 400-foot I-90 corridor. Therefore, the company was aware that mining would not be permitted within the highway right-of-way before the lease was issued.

(Belco's Reply, Exh. H at 2.)

We conclude that BLM's emphasis upon the fact that Belco obtained its lease after the construction of I-90 is totally misplaced. Certainly, we must presume Congress was aware of that fact when it included the Belco lease in the list of those eligible for exchange. Moreover, when BLM entered into the Agreement with Belco which required Belco to expend tens of thousands of

dollars performing tests on and evaluations of coal properties, it had knowledge of the circumstances of Belco's lease. BLM cannot now utilize that pre-existing fact as a basis for rejection of the exchange proposal.

BLM's third policy reason for granting Exxon's lease exchange, that the entire lease is near the city of Gillette, Wyoming, is not disputed by Belco as a reasonable basis for doing so. However, we find merit in Belco's criticism of BLM's approach:

[T]he decision [to consummate the Exxon exchange] appears to be made solely on this consideration rather than on I-90, the principal issue involved in Section 1(b) and (6) of Pub. L. 95-554. On the other hand, BLM has chosen a different policy in regards to Belco, i.e. that the issue in granting or denying the exchange is whether the lease was in fact encumbered by I-90. (Belco's lease is, in fact, in close proximity [to] both the town of Buffalo and to the Lake DeSmet area, which Pub. L. 95-554 specifically undertakes to protect from environmentally damaging coal development).

(Belco Reply Brief at 14.)

Further, we reject the suggestion in BLM's decision that the exchange should be denied because the entire lease was not encumbered. Neither the Act nor the Department's regulations require such a result. To the contrary, P.L. 95-554 refers in clear terms to the requirement that "[t]he leases to be issued by the Secretary pursuant to the authority granted by subsections (a) and (b) of this Act and the leases or portions thereof or rights to leases to be exchanged therefore shall be of equal value." In addition, regulation 43 CFR 3435.1 was amended in 1982 to reflect P.L. 95-554, providing that an exchange may be approved for "an existing lease or preference right lease application or portions thereof * * *." [Emphasis added.] 44 FR 42628 (July 19, 1979), as amended at 47 FR 33144 (July 30, 1982). Again, Belco points to the treatment of Exxon's lease exchange as evidence of BLM's arbitrary approach: Exxon's lease embraces 7-1/2 sections, and construction of I-90 encumbered only 2 of those sections. Nevertheless, Exxon was permitted to exchange 4-1/2 sections of the lease and retain 3 sections. In short, to the extent that BLM's decision denying Belco's exchange proposal rests upon the proposition that Belco's entire lease was not encumbered by construction of I-90, that decision is erroneous.

As a final matter, we will address Belco's related arguments that BLM failed to make a good faith determination of whether the exchange was in the public interest as required by the Agreement summarized in footnote 4, supra, and that after the passage of 7 years BLM has waived its right to deny the exchange. Belco argues that despite the obligations agreed to by BLM, BLM made no effort to determine if the exchange was in the public interest and performed no economic or engineering analyses as required by the Agreement (SOR at 6). In contrast, Belco asserts that it had an independent engineering firm conduct an economic evaluation of the lease and that the evaluation was submitted to BLM in accordance with the Agreement in May 1983.

In a memorandum dated November 6, 1984, the Wyoming State Director requested that the District Manager provide information regarding three exchange proposals, including Belco's (SOR, Exh. E). In response to that memorandum, the District Manager stated in a December 7, 1984, memorandum that (1) it was unlikely that lease W-0322794 "will have commercial viability in the foreseeable future," due to the combination of "very low heat content and high sulfur," which makes the coal "unusable for power generation"; and (2) because the prospecting permit was issued on January 31, 1966, and the coal lease was issued on January 1, 1970, with construction of I-90 beginning in 1960, "no loss of value occurred due to I-90 and * * * any proposed exchange of Federal coal lease W-0322794 should be refused" (SOR, Exh. F).

By memorandum dated January 3, 1985, the Wyoming Deputy State Director recommended to the Wyoming State Director that Belco's exchange be denied "based on the fact that I-90 was in-place before the lease was acquired, although he admitted" that "[t]his I-90 exchange is complicated by the fact that Belco and the Department have signed an agreement to examine the merits of the proposed exchange." The strategy suggested was to advise "Belco that even if the exchange were pursued, [BLM] would move to reduce the offered lands to those truly encumbered and we would probably find the lease to have little or no value" (SOR, Exh. G).

These letters expose the failure by BLM to meet its obligations under the Agreement and the regulations. 7/ Both require a public interest determination. Although the letters express reservations about the value of the lease, the record does not contain information to support BLM's position on value. On the other hand, Belco submitted an independent evaluation which concluded that the coal within "the lease may be recovered economically using conventional surface mining equipment" (SOR, Exh. D at 1-1).

We must vacate BLM's arbitrary and capricious denial of Belco's exchange proposal, and remand this case so that BLM may undertake the required public interest determination. 8/

7/ We reject Belco's claim that BLM waived its right to deny the exchange by failing to adhere to the deadlines set forth in the Agreement. An exchange may not be consummated without the necessary public interest finding.

8/ We note that on Jan. 14 and 16, 1987, counsel for BLM filed motions requesting that the Board take official notice of the proceedings in Belco Petroleum Co. v. Hodel, No. 86-0451J (D. Wyo., filed Dec. 29, 1986, dismissed Dec. 31, 1986), and the court's order in that case, dated Jan. 5, 1987. On Jan. 23, 1987, counsel for Belco filed a similar motion. In that case Belco sought a temporary order restraining the Department from enforcing the provisions of section 3 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 201(a)(2)(A) (Supp. III 1985), in accordance with Departmental regulations published Dec. 5, 1986. 51 FR 43910. Belco sought to prevent action under those regulations pending the outcome of this appeal. The court denied the relief sought by Belco, and at the court hearing Belco stated that it was relinquishing lease W-0322794. However, as stated in the court's order the relinquishment was made for the express purpose of complying with Departmental regulations, and Belco expressly reserved any rights to continue to pursue the present appeal.

2 Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is vacated and remanded for action consistent with this opinion.

Bruce R. Harris
Administrative Judge

I concur:

James L. Burski
Administrative Judge.

ADMINISTRATIVE JUDGE ARNESS DISSENTING:

I agree with the statement of the facts and issues made by the majority opinion, but disagree with the conclusion that this case should be remanded to the Bureau of Land Management (BLM) for determination whether the public interest requires an exchange of the Belco lease. Given the background of this appeal, as explained by the lead opinion, that conclusion is a non sequitur. The lead opinion has already explained the reasons why such an exchange is in the public interest. The reasons why it is so are revealed by the opinion's review of the legislative history of P.L. 95-554, the nature and location of the Belco lease on Interstate Highway 90, and the exchange agreement made for the similarly located Exxon lease. No further explanation is needed. The record is demonstrably complete enough to permit decision of the "public interest" issue by this Board.

This Board has the authority and, in this case the duty (as much as did BLM) to make the finding concerning the public interest required by 43 CFR 3435.2(c). See, e.g., Peabody Coal Co., 93 IBLA 317, 323, 93 I.D. 394, 398 (1986), where this Board observed that it "is not required to accept as precedent erroneous decisions made by the Secretary's subordinates," but may proceed to make required decisions for the Secretary in the course of the proper exercise of its review authority. This is such a case. Although the determination made by BLM concerning whether the Belco exchange was in the public interest was erroneous, there was in fact a determination made, as the decision appealed from declares, and as the record on appeal shows. More importantly, the same considerations which impelled the Bureau on May 3, 1985, to make a decision contrary to the expressed will of Congress, by finding the Belco exchange tract not to be in the public interest, remain operative and will inevitably lead to another rejection of the Belco exchange unless this Board acts to prevent the continuation of error. BLM frankly explains the reason for the course taken concerning the decision to refuse the Belco lease exchange in a memorandum dated January 3, 1985, to the State Director from the Chief, Branch of Solid Minerals:

This I-90 exchange is complicated by the fact that Belco and the Department have signed an agreement to examine the merits of the proposed exchange. The agreement also required Belco to conduct additional drilling of the selected lands.

Our recommended strategy is similar to that suggested for P & H. That is to coordinate exchange denial with the Governor based on the fact that I-90 was in-place before the lease was acquired. Then advise Belco that even if the exchange were pursued, we would move to reduce the offered lands to those truly encumbered and we would probably find the lease to have little or no value.

We do not support reimbursement of Belco for the drilling expenses incurred on the selected lands because (1) such information could benefit Belco during a competitive offering

of the Hay Creek Tract (the selection), (2) drilling is an administrative risk that the company agreed to undertake, and (3) we don't have the funds.

In other words, the Belco exchange is to be rejected because the value of the lease, as measured by BLM, is too low to merit exchange for the Hay Creek tract desired in exchange by Belco for the Interstate Highway 90 lease location. 1/

This appraisal of the relative merits of the exchange will not be changed by this Board's opinion, and unless it is made unmistakable that, at least as far as the Interstate Highway 90 tract is concerned, it is in the public interest that there be an exchange, it is likely the exchange will again be rejected by BLM for the same underlying reason as before -- the opinion that the Belco lease on Interstate Highway 90 is of low value.

The exchange need not be for the entire tract, nor need it be made for the Hay Creek coal, but the determination concerning the exchange should be made now, by this Board, that the regulatory requirement that there be a finding this exchange is in the public interest as required by 43 CFR 3435.2(c) has been satisfied in the case of the Belco lease mentioned by P.L. 95-554. Only by this approach will sufficient direction be given to BLM. The appeal should be returned to BLM with instructions to proceed with further administration of this exchange, that is, to determine the extent of the land to be exchanged, the amount and value of the coal involved, and to identify appropriate lands to be obtained by Belco in exchange for the Interstate Highway 90 lease. Any other approach is likely to result in repeated error leading to the delay of further administrative review of this exchange.

Franklin D. Arness,
Administrative Judge.

1/ Although it is not part of the record on appeal, the Board should not be oblivious to the meaning of a statement attributed by a natural resources trade journal to a Departmental employee concerned with the Belco exchange: "An attorney at BLM in Denver said that I-90 was completed several years before Belco acquired the lease, and the company knew at that time the coal was unrecoverable." "It was a scam," he said. "It was a junk lease with very poor coal that they hoped to exchange for a better lease." Inside Energy/with Federal Lands, Jan. 19, 1987, at 11. It is also worth noting that Belco has filed an engineering study of the Interstate Highway 90 tract in this appeal which concludes the lease is a valuable coal lease worth developing.

